No. 14,389

In the United States Court of Appeals for the Ninth Circuit

TRIPLE "A" MACHINE SHOP, INC., LIBELANT-APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLEE

~~(No. 26198 Admiralty)~~

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

The grounds for invoking the jurisdiction of the District Court did not appear in the libelant's pleadings. Libelant-appellant now contends that such jurisdiction exists under 28 U. S. C. 1333; 46 U. S. C. 742, 743, 971; and Admiralty Rule 13 (Brief, pp. 2-3). The findings of fact, conclusions of law, and judgment of the District Court (R. 93-103, 108-109) are not reported. This Court's jurisdiction rests upon 28 U. S. C. 1291 by reason of a notice of appeal filed May 7, 1954, from a modified final decree in favor of the United States filed April 15, 1954 (R. 108-109).

STATEMENT

This libel was brought by Triple "A" Machine Shop, Inc., libelant-appellant here, to recover money alleged to be owed it by the United States for purported "extra work" performed under a contract with the Military Sea Transportation Service, Pacific to repair and alter five lifeboats owned by the Government. The District Court for the Northern District of California, Southern Division, after a trial on the merits, entered judgment for the Government (R. 108-109). The facts as revealed by the Agreed Facts of the Pre-Trial Order and the findings of the District Court may be summarized as follows:

On February 10, 1950, the United States, through its agency Military Sea Transportation Service, Pacific,[1] and Triple "A" Machine Shop, Inc.,[2] entered into Master Contract MST-235 whereby the libelant contracted, upon acceptance of its bids, to make repairs, alterations and additions to vessels of the United States under job orders issued by the Contracting Officer of MSTSP (R. 69). On September 21, 1950, by Invitation to Bid No. P 51-36, MSTSP solicited bids from various ship repair and construction firms in the San Francisco-Oakland area to perform work involving repairs to five Government lifeboats (R. 69). The bids were to be made on the basis of Specification No. MSTSP 51-64, issued the previous day, which set forth the work to be accomplished on the lifeboats (R. 69). The Invitation to Bid advised bidders of the location of the lifeboats, their availability for inspection and that the aforementioned specifications, which accom-

[1] Hereinafter MSTSP.

[2] Hereinafter also referred to as the libelant or the Contractor.

panied the invitation, would become part of the job order upon issuance thereof (R. 95-96).

Thereupon, Triple "A", through its authorized agent, its vice-president and general manager, made a thorough inspection of the five lifeboats as to their condition and need for repairs; the agent, who was also its marine surveyor, made such notes relative to repairs to be accomplished as he deemed necessary (R. 97). Subsequently, on September 29, 1950, Triple "A", by its bid in response to the above invitation, offered "subject to all the terms and conditions of the bid, schedule and instructions relating thereto", to make the necessary repairs to the five lifeboats designated in the invitation and specifications (R. 97). The bid price was $3,775.00 and was submitted on the basis of computations as to work necessary and cost thereof by Triple "A" 's aforementioned agent (R. 97).

On October 2, 1950, MSTSP accepted the bid of Triple "A" and issued Job Order No. 10 in accordance with Articles 3 and 4 of Master Ship Repair Contract No. MST-235 and the Invitation (R. 98). By such job order libelant was directed to "furnish the supplies and services required to perform the work described in Specification No. MSTSP 51-64" at the agreed total price of $3,775.00 (R. 98). This job order was accepted by libelant under the date of October 11, 1950 (R. 34-36). Thereafter Triple "A" entered upon the performance of the work pursuant to the master contract, the specifications and the job order. On November 27, 1950, MSTSP issued Change Order A to Job Order No. 10 providing for Addition No. 1 to the specifications, increasing the job order price and authorizing payment to libelant of $9,490.00 for replacement of air and pro-

vision tanks in four of the lifeboats (R. 98). The change order was issued in conformance with the specifications, which expressly excluded replacement of deteriorated tanks from the work to be accomplished at the bid price (R. 98).

Prior to completion of the repairs to the five lifeboats the Coast Guard and an inspector for MSTSP made an inspection of the boats pursuant to the specifications (*infra,* p. 36) and determined that certain repairs were necessary in order to insure compliance with Federal statutory requirements as to seaworthiness (R. 99). On October 16, 1950, libelant was directed to furnish the requisite materials and to accomplish the repairs necessary to effect complete repair and reconditioning of the lifeboats as prescribed in the specifications (R. 99-100). Triple "A" advised MSTSP that it expected extra compensation for the work found necessary as a result of the inspection (R. 100), however, it was informed formally by MSTSP, through the Contracting Officer, that the labor and materials for which extra compensation was requested were considered to be fully covered by the specifications and job order and that no added compensation would be paid (R. 100). Libelant proceeded with the work under written protest and with notice to the Contracting Officer that it would require payment of the reasonable value of the additional work (R. 71).

On November 2, 1950, in response to a written demand for further compensation for the work ordered, the Contracting Officer, MSTSP, again made a formal determination, communicated to libelant, that the specifications and job order required libelant to do all work necessary "to completely repair" and to recondition

the lifeboats and that the work and materials libelant was directed to furnish were not "extra", were not outside the terms, scope and provisions of the contract, and therefore the claim for additional payment would be denied (R. 100). Libelant appealed the Contracting Officer's decision to the Commander, Military Sea Transportation Service, (MSTS), Washington, D. C., the appeal being taken pursuant to both Articles 5(j) and 14 of the Master Contract (*infra,* pp. 34-36) (R. 101).[3] The dispute was referred by the Commander, MSTS, to the Contract Advisory Board for decision. That Board determined that the dispute concerned a question arising out of the interpretation of plans and specifications and therefore came within Article 5(j) of the master contract (R. 72). Substantively, the Board held that the specifications and job order fully covered all work required of libelant, and accordingly there was no entitlement to extra compensation. (R. 72).

Subsequently, on October 1, 1952, this libel was brought in the United States District Court for the Northern District of California, Southern Division (R. 1-6). The libel stated three claims for monies due from the United States for the repairs done by libelant: the first was for the $3,775.00 the United States agreed to pay under the original job order (R. 4); the second was for the $9,490.00 the Government agreed to pay for the repairs performed pursuant to the change order (R. 4-5); and the third claim was for $6,342.00 for the

[3] Libelant had originally believed that the dispute was covered by Article 14 of the Master Contract rather than Article 5(j). When informed that the dispute properly came within Article 5(j), libelant nevertheless insisted upon appealing under both articles (R. 64, 80-84).

repairs found necessary upon inspection by Government representatives and which libelant alleged was due it under its interpretation of the contract (R. 5-6).[4] The Government answered, alleging prior payment of the first two amounts and denying liability for the third claim (R. 11-18). In addition, it was affirmatively alleged that the third claim was barred as the result of its final disallowance by the Contract Advisory Board pursuant to Article 5(j) of the master contract (R. 14-18). When it was shown by the Government that the first and second claims had been paid previously, libelant dropped those counts and the case was tried with only the third claim in dispute (R. 70).

On October 30, 1953, the Government moved to dismiss the libel on the basis of the pleadings, exhibits and documents on file (R. 67). The Government contended that the decision of the Contract Advisory Board was determinative of this matter under Article 5(j) of the master contract. In opposition, libelant urged that the administrative determination made pursuant to Article 5(j) was not, by the terms of the contract, final and conclusive, and that it was entitled to adjudication of the matter, on its merits, in the courts (R. 89). The District Court (per Louis E. Goodman, J.), on December 11, 1953, issued an Order Reserving Ruling on the Motion to Dismiss (R. 87-89). The Court held that there was no occasion for it to decide whether determinations made pursuant to the procedure prescribed in Article 5(j) were intended by the parties to be final unless the disputed matters were of the class required to be determined by Article 5(j) (R. 89). The Court stated that it could not ascertain from the plead-

[4] The value of the labor and materials furnished by the contractor for this work was subsequently agreed to be $6,040.00 (R. 89-91).

ings, exhibits, and the agreed statement of facts whether the matters in dispute were of the class to be determined under Article 5(j) or Article 14 or in some other manner and that only the evidence at the trial would clarify the issue. Therefore, pursuant to Rule 12(d), Federal Rules of Civil Procedure, ruling on the motion to dismiss was reserved until after the trial (R. 89).

Subsequently, on March 10, 1954, after a trial on the merits of the disputed claim, the District Court (per Michael J. Roche, J.) ordered entry of judgment precluding recovery by libelant. First, the Court held, on the basis of its own independent analysis of libelant's contractual obligations, that the contested work was contemplated by and provided for in the specifications and job order and accordingly that the libelant was not entitled to extra pay therefor above and beyond the contract price as submitted by libelant in its bid for repairs and agreed to by the parties (R. 102). In addition, the Court sustained the Government's argument as to administrative finality. It held that the Contracting Officer, and the Commander, MSTS, acting pursuant to Article 5(j) of the master contract, having determined that the alleged "extra work" was provided for and contemplated by the specifications, job order, and bid and that pay above and beyond the agreed contract price was not contemplated or provided for in the repair agreement, such determination was final and conclusive on the parties and could not be set aside by the Court (R. 102-103). The Court rejected libelant's contention that if the dispute was governed by Article 5(j) of the master contract, rather than Article 14, administrative determination of the dispute was not

final (R. 103). Judgment was entered for the Government accordingly (R. 108-109).[5]

QUESTIONS PRESENTED

1. Whether the District Court properly determined that the alleged "extra work" required of libelant by the Government, so as to repair the vessels completely, fell within libelant's contractual obligations under its original bid price.

2. Whether, under the facts of this case, the District Court was correct in holding that the administrative determination of this dispute under Article 5(j) of the master contract constituted a final and conclusive determination of the controversy between the parties.

STATUTE AND CONTRACT PROVISIONS INVOLVED

Public Law 356, 83rd Congress, Second Session, 68 Stat. 81; and the relevant provisions of Master Contract No. MST-235; Specification No. MSTSP 51-64; and Job Order No. 10 are set forth in the Appendix, *infra,* pp. 32-37.

SUMMARY OF ARGUMENT

The decision of the District Court precluding recovery from the Government by Triple "A" for the alleged "extra work" on the lifeboats in question, was grounded on dual, but independent foundations: first, the Court's own determination of the dispute under the governing contractual documents; and second, the conclusiveness the court held was to be accorded the

[5] The original decree, entered March 10, 1954, provided that "the cause * * * is hereby dismissed". (R. 92-93). By a Modified Final Decree lodged April 5, 1954, this was amended to read "that judgment be entered in favor of the respondent United States of America," so as to conform to the Court's prior Order for Entry of Judgment (R. 108-109).

administrative determination of this dispute under Article 5(j) of the master contract. Analysis of the pertinent provisions of the relevant documents in the light of the facts of the instant case clearly substantiates these holdings and necessitates affirmance.

Finality aside, it is evident from an examination of the express language of the controlling documents that libelant's contractual duty was to effect the "complete repair" of these lifeboats, and encompassed the so-called "extra work" for which additional compensation is now sought. The master contract, the Invitation for Bids, the bid, and Job Order No. 10 undeniably make Specification No. MSTSP 51-64 the focal document in ascertaining the extent of libelant's contractual responsibility to the Government under its original bid price. Under any realistic appraisal of the dealings between libelant and the Government, these specifications, in their entirety, delineated libelant's commitment to repair. This conclusion is reached whether the contract be considered as embodying all of the aforementioned documents and they are considered together; whether the technical offer by bid and its acceptance by the issuance of the job order alone are considered as constituting the contract; or whether the job order as accepted by libelant is the final agreement of the parties. As to the content of the specifications themselves, they explicitly state that it is their intent "to provide for the complete repair and reconditioning" of these boats, "all as necessary to place [them] in first class operating condition and ready for use" (*infra,* p. 36). Moreover, the contractor was to furnish "all labor, materials, transportation and all other equipment necessary to completely repair" these lifeboats, with the

express proviso that the "work shall include but shall not be limited to any detailed specifications which follow" (*infra,* p. 36. In addition, libelant's work was specifically to be subject to inspection and approval by designated Government inspectors (*infra,* p. 36). In view of this unequivocal language it is apparent that libelant assumed the risk of ascertaining the amount and cost of repairs necessary "to completely repair" the vessels and that the court below was compelled to hold that libelant was not entitled to greater compensation than the agreed contract price as submitted by Triple "A" in its bid for repairs.

Apart from the above conclusion, which was reached only after a trial on the merits and the Court's own independent ascertainment of libelant's responsibilities under its bid, the same result is dictated by Article 5(j) of the master contract. The instant dispute, arising as it does out of the interpretation of specifications, was properly determinable under Article 5(j). Having been submitted under Article 5(j) to a determination by the Contracting Officer and affirmed on appeal by the designated representative of the Commander, MSTS, such administrative determination is, by the clear import of that article, conclusive of this dispute. The District Court properly held that it bound the parties. Nor is this result changed by the recent act of Congress limiting the effect, for purposes of judicial review, of finality clauses in Government contracts. Act of May 11, 1954, 68 Stat. 81 (*infra,* p. 32). That Act's prohibition against inclusion of law disputes clauses in Government contracts is applicable solely to future Government contracts. Respecting administrative determinations under such clauses in existing Government contracts, the Act specifically provides that such

decisions shall be final and conclusive unless they are fraudulent or capricious, or arbitrary or so grossly erroneous as necessarily to imply bad faith, or are not supported by substantial evidence. Such allegations as to this determination cannot seriously be made here, nor could they be sustained if made in view of the District Court's independent finding, after a trial on the merits, that the dispute was correctly resolved.

ARGUMENT

I

The District Court, on the Basis of Its Own Independent Determination, Properly Held That the Alleged "Extra Work" Performed by Libelant Was Encompassed in Its Contractual Commitments Under the Original Bid Price.

The primary basis for the decision below, denying libelant's prayer for additional compensation for the purported "extra work" performed at Government direction, was the District Court's own determination that the disputed work fell within the libelant's contractual obligations under its original bid. This conclusion was reached by the Court only after a trial on the merits of this issue, and independently of any finality thereafter held to be conferred upon the Government's resolution of this dispute under Article 5(j) of the master contract. Careful analysis of the facts of the instant case within the framework of the relevant and governing contractual documents, particularly the specifications, substantiates the District Court's position.

A. *The Specifications Were the Controlling Element in Defining Libelant's Commitments Under the Contract for Repair*

In our view, and also in the view of the District Court, the critical instrument for ascertaining the extent of libelant's responsibilities under its bid is Specification No. MSTSP 51-64. This was the primary document setting forth the work to be performed by libelant under its bid. It was referred to in the master contract, attached to the Invitation for Bids and incorporated in the bid and job order. Clearly, it was intended to be the basis for libelant's bid and was so recognized. Its terms, we believe, are controlling. However, to place the specifications in their proper context, prior examination of the other relevant documents is in order.

The document for initial consideration must be Master Contract No. MST-235. This contract, entered into by libelant and the Government on February 10, 1950, was the overriding agreement controlling all future contracts for repair made thereunder between the named parties. Specifically it provided that its purpose was "to establish the terms upon which the Contractor will effect repairs, completions, alterations of and additions to vessels of the Government under job orders issued by the Contracting Officer from time to time under this contract" (*infra,* p. 33). Agreement to its terms was a condition precedent to any specific job awards by the Government. Under the procedure established by that contract, when it was determined that a Government vessel required repair or alteration the contracting officer was to invite bids from contractors under master contract, after notifying them of the work to be performed and the times for commence-

ment and completion. If the individual contractor was willing and able to perform the work he was to inspect the work to be accomplished on the vessel and submit a bid for its performance.[6] By the terms of the above contract, the contractor "shall as promptly as possible after inspection of the work submit a bid for the performance of the work *in accordance with plans and specifications* furnished or to be furnished by the Government" (emphasis added) (*infra,* p. 33). If after receipt of all bids the contracting officer determined that the work was to be awarded to any individual contractor the price for the work was to be set forth in a job order, which job order was to be signed and issued by the contracting officer and signed and acknowledged by an authorized representative of the contractor (R. 27-28). Upon issuance of the job order, the master contract states, "the Contractor shall promptly commence the work specified therein and in any plans and *specifications made a part thereof,* and shall diligently prosecute the work to completion to the satisfaction of the Contracting Officer" (emphasis added) (*infra,* pp. 33-34).

Clearly then, the master contract envisages the specifications as the key element in defining the extent of the bidder's contractual liability to repair. This position is fortified by inspection of Invitation No: P 51-36, the invitation for bids in the instant case (R. 51-58). Schedule No. P 51-36-1 of this invitation provides as follows in pertinent part (R. 52):

> * * * 6. The following drawings and specifications accompany this schedule and upon the issuance of a Job Order, become a part thereof: Speci-

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[6] The Master Contract also provided for job contracts by negotiation as contrasted to bid (R. 26-27). There is no dispute that the job contract in question was effected through the bid technique.

> fication No. MSTSP 51-64. Repairs to Five (5) Lifeboats.

Thus, potential bidders were notified by the invitation, through the accompanying specifications, of the extent of the repairs intended to be effected under the proposed job award and it was also made clear that these specifications, in their entirety, would become part of the job order when issued. It is difficult to conceive how a prospective bidder could reasonably believe that the basis for his inspection and bid was other than the attached specifications or that the Government would accept bids on any other basis.

Moreover, libelant's bid itself states that it is made (R. 58):

> In compliance with Invitation for Bids Number P 51-36 * * * and subject to all the terms and conditions of the bid, *schedule,* and instructions relating thereto: * * * (emphasis added).

And as indicated previously, the "schedule" of the above invitation incorporates the specifications and states that upon issuance of a job order the specifications are to become part of that order. Furthermore, the bid states that if it is accepted the libelant agrees to accept a job order (R. 59), and such job order would perforce include Specification No. MSTSP 51-64, in accordance with the schedule of the invitation and the master contract, to which the bid was expressly subject.

Job Order No: 10, which was the order foreshadowed by the master contract, the invitation and the bid, expressly incorporates the specifications as a whole, making them the basis of the work to be performed, stating (*infra,* pp. 36-37):

> 1. Work: The Contractor shall furnish the supplies and services required to perform the work described in the attached plans and specifications made a part hereof and designated as follows: Repairs to Five (5) Lifeboats, Specification No. MSTSP 51-64.

This job order received written acceptance by libelant (R. 36).

Clearly, therefore, the terms of the specifications constitute the essential descriptive element in this contract for repair and are controlling in delineating the extent of libelant's commitments to repair under its bid price. It is to those terms which we now turn.

B. *Under the Terms of the Specifications Calling for the Complete Repair of these Vessels, the Alleged "Extra Work" Fell Within Libelant's Obligation to Repair under its Original Bid*

(1) Specification No. MSTSP 51-64 (R. 36-42) is the instrument containing the repair specifications for the five lifeboats in controversy. The language of this document fully supports, if it does not compel, the decision of the District Court; namely, that *complete* repair of these lifeboats was provided for and that compensation above and beyond the bid price of $3,775 to effect those repairs was unwarranted.

The introductory language of these specifications is quite explicit in stating (*infra* p. 36):

> It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five (5) lifeboats, all as necessary to place the boats in first class operating condition and ready for use.

The specifications go on to provide that "the contractor shall furnish all labor, materials, transportation and all other equipment necessary to completely repair" these lifeboats (*infra* p. 36). Although the specifications detail some of the work encumbent upon the contractor in performing its job, it is expressly stated that, "The work shall include, but shall not be limited to, any detailed specifications which follow" (*infra* p. 36).[7] It is then provided that "All work shall be subject to inspection and approval by the U.S. Coast Guard and the U.S. Navy Inspector assigned" (*infra* p. 36).

Fortifying the conclusion that complete repair of these vessels was the purport of the specifications and that extra compensation was not intended for work not detailed in the specifications is the one exception contained in that document. It was provided that replacement of deteriorated tanks was to be accomplished only on a written field order, which under Article 6 of the master contract called for extra compensation (R. 38). Significantly, this was the only provision in the contract for extra work.[8] Since extra work in this respect was specifically provided for as an exception to the prior provisions for complete repair of the vessels, it is evident that the work contemplated under this document was not limited to the itemized repairs relied upon by libelant (*infra,* pp. 17-21), with other repairs to be ac-

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[7] Libelant's agent testified that he was aware of this language in the specifications at the time he made his inspection prior to submission of the bid (R. 151).

[8] In fact, renewal of air and provision tanks in four of the lifeboats was found to be necessary. Pursuant to the specifications, Change Order "A" to Job Order No: 10, and Addition No. 1 to the specifications were issued to authorize these repairs (R. 43-45). In accordance with Article 6 of the master contract, the job order price was increased by $9,490 to compensate for this extra work (R. 43). This sum has been paid to libelant (R. 46).

complished only for extra compensation, but rather included all work necessary to repair the lifeboats completely.

(2) Libelant attempts to circumvent the explicit terms of the specifications in several different ways. However, analytical examination of these contentions reveals that they are unavailing.

Libelant's primary contention is that the terms of its bid, which constituted its offer to repair, limited its contractual obligation to the repair of only those "Category A" items detailed in the specifications, and that the specifications as a whole formed no part of its contract with the Government. In view of what has been shown (*supra,* pp. 12-17) this position is simply untenable. Libelant's bid was expressly made subject to the schedule of the invitation in which was incorporated the entire specifications. Moreover, libelant in its bid agreed to accept the job order issued, and such job order, by the very terms of the master contract, and the invitation, was to include the specifications for repair; the same specifications with which libelant had been furnished at the time the invitation was issued.

Furthermore, contrary to libelant's assertion, it is not merely the terms of the bid which control its contractual obligations, but also the terms of the acceptance of that bid. It is true that as a matter of contract law the bid constitutes the specific offer in this instance, the invitation merely constituting a preliminary invitation for an offer.[9] It is also true that an acceptance must acquiesce in the offer as made to constitute a valid ac-

[9] However, in seeking light on the meaning of words used in a contract prior negotiations may be considered. *Pacific Portland Cement Co.* v. *Food Machine and Chemical Co.,* 178 F. 2d 541, 552 (C.A. 9).

ceptance forming a contract, and that if the acceptance deviates from the terms of the offer it is a rejection of the offer. *Minneapolis and St. L. R. Co.* v. *Columbus Rolling Mill,* 119 U.S. 149; *Iselin* v. *United States,* 271 U. S. 136, 139; 1 Corbin on Contracts, § 82. From this libelant apparently contends that since, in its view, its bid was limited to the "Category A" items detailed in the specifications, its potential contractural responsibilities were also so restricted. However, aside from the fact that libelant's offer or bid was expressly made "subject to" and in effect incorporated all of the specifications, and that such specifications were not limited to repair of the listed "Category A" items, but stated in the most precise terms that the "work shall include but not be limited to any detailed specifications which follow" (*infra,* p. 36), libelant's contention fails on other grounds. An acceptance which deviates from the terms of an offer is more than a mere rejection, it also constitutes a counter-offer which may in turn be accepted by the original offeree. *Iselin* v. *United States,* 271 U. S. 136, 139; *Baltimore and O. R. Co.* v. *Youngstown Boiler and Tank Co.,* 64 F. 2d 638 (C.A. 6); *American Lbr. and Mfg. Co.* v. *Atlantic Mill and Lbr. Co.,* 290 Fed. 632, 635 (C.A. 3); *Cleborne* v. *Totten,* 57 F. 2d 435, 438 (C.A. D.C.); 1 Corbin § 89; Restatement, Contracts, §60. The Government's acceptance was, by the terms of the master contract (Article 3) and the invitation (Section 7), to be in the form of a job order (R. 27-28, 52). The job order which here issued stated that the Contractor was to "furnish the supplies and services required to perform the work described" in Specification No. MSTSP 51-64 (*infra,* pp. 36-37). If this job order is not considered to be an acceptance of the identical offer made by libelant, and

we insist that it was, then it constituted a counter-offer to pay $3,775.00 for the performance of the work as set forth in the entire attached specifications. This counter-offer was accepted by libelant, not only by virtue of the fact that work on the vessels was commenced pursuant thereto (*McKell* v. *Chesapeake and Ohio R. Co.,* 175 Fed. 321, 328 (C. A. 6), certiorari denied, 220 U. S. 613; *American Lbr. and Mfg. Co.* v. *Atlantic Mill and Lbr. Co.,* 290 Fed. 632, 635 (C. A. 3); Annotation 135 A. L. R. 821, 826), but also because this job order was signed as "accepted" by libelant (R. 36), pursuant to Article 3(a) of the master contract (R. 27-28). In fact, libelant's principal agent in this dispute conceded that this job order was a part of libelant's contract (R. 172). Therefore, even under a proper resolution of libelant's own theory, it has no ground for complaint since the specifications as a whole still controlled.

Nor can the District Court's conclusion be avoided by what libelant insists must be a strict construction of the terms of the contract against the Government. Concededly, as a general guide for contract construction, the terms of the instrument will be construed against the party drafting the instrument. Since in the present case the Government drafted the controlling documents, libelant contends that ambiguities must be resolved in its favor. The principal difficulty with this argument is that ambiguities in the contract are essential to the application of this construction aid. Here, the language of the controlling documents is plain and unambiguous. The specifications expressly and repeatedly call for complete repair, and specifically do not limit the work to be done to the detailed items set forth therein (*infra,* p. 36). In view of this express language, the need for the application of the strict construction doctrine disappears for it is equally well established that courts will

not read ambiguities into a contract where none exist, or distort the plain language of a contract to create ambiguities, just to avoid hard consequences. *Bergholm* v. *Peoria Life Ins. Co.,* 284 U. S. 489, 492; *Whiting Stoker Co.* v. *Chicago Stoker Corp.,* 171 F. 2d 248, 250-251 (C. A. 7), certiorari denied, 337 U. S. 915.

Finally, libelant contends that all of the repairs insisted upon by the Government, in order to insure compliance with Federal statutory requirements as to seaworthiness, were not ascertainable through inspection by libelant's agent prior to submission of its bid. Therefore, libelant insists these repairs could not have been encompassed within the terms of its bid. However, this assertion was considered by the District Court and extensive testimony was taken on this point. On the basis of all of the evidence adduced, the trial court found that such items of repair were subject of inspection and ascertainment by libelant's representative prior to submission of the bid (R. 99). In view of the record below, this finding of fact can hardly be characterized as clearly erroneous. Cf. R. 154-162.[10] Moreover, the terms of the specifications, which libelant had before it at the time of its preliminary inspection, were unequivocal in notifying bidders that "complete repair" of the vessels was intended under the job order to be issued, and that the bidder's obligation would not be limited to any repairs detailed therein (*infra,* p. 37). Therefore, as in any case where bids are called for to effect repairs

[10] That a trial court's findings in an admiralty case are sustainable unless clearly erroneous is settled under the governing decisions. *McAllister* v. *United States,* 348 U.S. 19; *Petterson Lighterage and Towing Corp.* v. *New York Cent. R. Co.,* 126 F. 2d 992, 994-995 (C.A. 2); *Boston Ins. Co.* v. *Dehydrating Process Co.,* 204 F. 2d 441, 444 (C.A. 1); *C. J. Dick Towing Co.* v. *The Leo,* 202 F. 2d 850, 854 (C.A. 5).

in accordance with certain express specifications, the burden is on the bidder to inspect, appraise and to reach its own conclusion as to the cost of repairs. If the cost is greater than the contractor anticipated, that is encompassed in the risk of undertaking such a job and creates no right to further compensation. Cf. *MacArthur Brothers Co.* v. *United States,* 258 U.S. 6, 12-13; *Day* v. *United States*, 245 U.S. 159, 161; *The President Roosevelt,* 116 F. 2d 420 (C. A. 2).[11]

II

The District Court Correctly Ruled That the Administrative Resolution of this Dispute, Pursuant to the Provisions of the Master Contract, Was Final and Dispositive.

As a secondary basis for precluding recovery by libelant, the court below held that the administrative determination of this dispute, pursuant to Article 5(j) of the master contract, constituted a final and conclusive decision as between the contracting parties and was dispositive. Although libelant has had its sought-after judicial reexamination of the dispute through a trial on the merits and has no proper ground for complaining that the District Court also ruled against it on the basis of the finality to be accorded the administrative determination of the dispute under Article 5(j), we deem it necessary to deal with this issue of finality not only as a basis for affirmance of the decision below, but

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[11] Libelant's attempt to manipulate the Government's and the District Court's use of the words "additional work" into a confession that the disputed work was, in fact, "extra work" (Brief, pp. 24-25), is transparent and unavailing. The term "additional work" was used to characterize the disputed work so as to distinguish it from the work which even libelant conceded it was bound to perform and had performed prior to Government inspection. Obviously, neither the Government nor the trial court believed the work to be "extra" and outside the scope of the contract.

also because we believe that the libel should have been dismissed on this ground.

A. *Administrative Determination of Disputes under Article (5j) of the Master Contract Are Properly Conclusive upon the Contracting Parties.*

(1) Initially, it is firmly established that where the contract so provides, a large degree of finality can be accorded decisions by Government officers of disputes arising under a Government contract.[12] *United States* v. *Wunderlich,* 342 U.S. 98; *United States* v. *Holpuch,* 328 U.S. 234; *Ripley* v. *United States,* 223 U.S. 695. It is likewise settled that finality as to such administrative determinations extends to disputes over interpretation of the terms of the contract. *United States* v. *Moorman,* 338 U.S. 457; *United States* v. *McShain,* 308 U.S. 512; *Merrill-Ruckgaber Co.* v. *United States,* 241 U.S. 387. Libelant attempts to avoid the impact of administrative finality by contending that the contractual provision which is here controlling, Article 5(j), fails to expressly provide that conclusiveness is to be accorded decisions thereunder. In contrast, libelant asserts, Article 14 of the master contract, which provides for the determination of disputes other than those covered by Article 5(j), establishes a different procedure for the administrative resolution of such disputes, and expressly provides that those decisions are to be final and conclusive.

These mechanical distinctions, however, were disregarded by Chief District Judge Roche in his final dis-

[12] The extent to which judicial review of such administrative determinations can be precluded will be discussed in some detail *infra,* pp. 28-31.

position of this libel when he held that administrative determinations under Article 5(j) were also entitled to finality. This holding, we submit, is correct. However, since libelant professes to find support for its thesis in Judge Goodman's opinion accompanying his reservation of ruling on the Government's Motion to Dismiss, it might be best to examine the procedural background of this dispute's administrative determination prior to any analysis of Article 5(j) itself.

(2) Originally libelant submitted this dispute to administrative determination under Article 14 of the master contract (R. 64-65). It was thereupon advised that the proper avenue for determination was Article 5(j) since the dispute was grounded upon a question of interpretation of the specifications (R. 84-85).[13] Thereafter, libelant notified MSTS that it was submitting the dispute for resolution under both articles

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[13] The master contract contains two provisions for the administrative determination of disputes—Articles 5(j) and 14. Article 14 is the general disputes provision of the contract, and sets forth the procedure for the determination of any dispute concerning a question of fact or price arising under the contract, or any job order or plan or the specifications, other than matters to be determined under Article 5(j). Article 5(j) prescribes the means for settlement of "any questions regarding or arising out of the interpretation of plans or specifications" or any inconsistency between plans and specifications (*infra*, pp. 34-36).

Article 14 establishes essentially a two-stage procedure for administrative determination—referral of disputes between the Contracting Officer and Contractor to the Commander, MSTS, for the initial unilateral determination, and appeal to the Secretary of the Navy (*infra*, pp. 35-36). The decision of the Secretary is made final and conclusive, and in the event no appeal is taken to the Secretary, the decision of the Commander, MSTS, is binding. Article 5(j) prescribes a two-stage procedure—initial determination by the Contracting Officer and appeal to the Commander, MSTS, or his representative. Article 5(j) does not specify that the Commander's decision shall be final and conclusive (*infra*, pp. 34-35).

(R. 81). However, in making its final determination the Contract Advisory Board, MSTS, ruled that the dispute was covered solely by Article 5(j) and denial of libelant's claim was made pursuant to that article (R. 61). Subsequent to the filing of the pleadings in this case, the Government moved for a dismissal, relying upon the finality of the prior administrative determination of the dispute under Article 5(j) (R. 67). Libelant countered, alleging that the dispute, if governed by Article 5(j), was not final under the terms of that article and therefore that it was entitled to judicial adjudication of the dispute. The District Court, in passing on this motion, did not rule, as contended here by libelant, that if the dispute fell within Article 5(j) the administrative decision would not be final. Its exact holding is embodied in the following language of its order (R. 89):

> There is no occasion for the court to decide whether determinations made pursuant to the procedure prescribed in Article 5(j) were intended by the parties to be final, unless the matters here in dispute were of the class required to be determined under Article 5(j).

The Court went on to state that it could not be determined from the pleadings, exhibits, and the agreed statement of facts whether the matters in dispute fell under Article 5(j) or Article 14 and that only the evidence at the trial would clarify the issue. Therefore, it reserved ruling on the motion to dismiss until the trial, in accordance with Rule 12(d), Federal Rules of Civil Procedure (R. 89). After the resultant trial on the merits, the Court, as previously indicated, held for

the Government, primarily upon the basis of its own evaluation of libelant's contractual commitments, and secondarily upon the basis of the dispute's falling within Article 5(j) and the finality attributable to administrative determinations under that article.[14]

(3) Turning now to the District Court's ultimate holding as to the finality attributable to Article 5(j) determinations, we find that it is abundantly sustained by relevant legal and factual considerations.

The fact that disputes as to interpretation (Article 5(j)) were placed in a separate category from disputes concerning questions of fact or price (Article 14) is certainly not controlling. Interpretive disputes are generally considered to be disputes over legal questions and are commonly treated separately from factual disputes in providing for their resolution in Government contracts. The Supreme Court has recognized this practice, taken note of its basis, and approved it. *United States* v. *Moorman,* 338 U. S. 457, 463. For the same reasons, the fact that differing procedures are set up by Articles 5(j) and 14 is not controlling. Questions concerning interpretation of the terms of these contracts are by their nature peculiarly within the final purview of MSTS and especially its Contract Advisory Board. Moreover, as the record shows, the Contract Advisory Board which rendered the "final decision" of MSTS (*infra,* p. 34) did so only after libelant's representative appeared before the Board on June 6, 1952, discussed the issues involved and advised the

[14] Significantly the Modified Final Decree provided that "judgment be entered herein in favor of the respondent United States of America" (R. 109), in accordance with the Order for Entry of Judgment (R. 91), and not that the action be "dismissed" as was inadvertently provided for in the original final decree (R. 93).

Board of the Contractor's position (R. 61).[15] In addition, libelant's attorney gave further written notification to MSTS, prior to that body's final decision, of the detailed basis for libelant's claim (R. 80-84). After a full hearing of the evidence and a careful consideration of the arguments presented by libelant's representatives, the Board determined that the specifications as bid upon by the Contractor, and the job order, as amended, were to be construed to include all of the work performed by Triple "A" with respect to the lifeboats in question and that extra compensation was not warranted (R. 61). It is evident therefore that the final decision under Article 5(j) was made only after the Contractor had been accorded the same right to be heard and offer evidence as precedes a final decision of the Secretary under Article 14.[16]

Nor is the fact that Article 5(j) does not use the terms "final and conclusive" prohibitive of the application of the finality principle to this type of dispute. The proper criterion for determining finality is not a mechanical construction of the language of the contract, but the ascertainment of the intent of the parties. Cf. *United States* v. *Moorman,* 338 U. S. 457, 462. Although the intention of parties to submit their con-

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[15] Libelant's representative was Mr. William Blake, its vice-president, general manager, and marine surveyor. (R. 61).

[16] Under Article 14, after the contracting officer's decision, the dispute, if not resolved by agreement between the contractor and the contracting officer, is to be referred to MSTS, which makes the initial unilateral determination. There is no provision for a contractor's being heard or presenting evidence to MSTS prior to its determination, as there is under Article 5(j) (R. 32-33). It is only in connection with appeals to the Secretary that hearings and presentation of evidence prior to a final decision are provided for under Article 14 (R. 33). Therefore, the procedures under the two articles are, in theory and in practice, roughly analogous.

tractual disputes to final determination outside the courts should be made manifest, "it is not necessary that any set form of words be used to express the purpose". *United States* v. *Hurley,* 182 Fed. 776, 779 (C.A. 8). In two of the earliest cases concerning the finality attributable to decisions of Government officers resolving disputes under Government contracts, the Supreme Court upheld finality of the officers' decisions notwithstanding the absence in the relevant contractual provisions of such words as "final", "binding" or "conclusive". *Kihlberg* v. *United States,* 97 U. S. 398; *Sweeney* v. *United States,* 109 U. S. 618.

Moreover, in *United States* v. *Gleason,* 175 U. S. 588, the Court addressed itself to allegations analogous to those now made by appellant. In *Gleason* the contract also contained two clauses for administrative resolution of disputes—one explicitly providing for finality—and the other, governing the claim then under consideration, not expressly saying that the Government agent's decision shall be final. That tribunal found no difficulty in holding that notwithstanding the absence of the word "final", under a proper construction of the contracts, finality was attributable to the agent's determination. 175 U.S. at 604-606, 608-609. See also *United States* v. *Hurley,* 182 Fed. 776, 778-779 (C.A. 8).

What the cases seem to require, therefore, is clear indication that the parties intended the administrative decision to be final. Here, a reasonable construction of Article 5(j) would indicate, as it did to the District Court, that finality was intended. The article expressly provides that its disputes "shall be determined by the Contracting Officer" subject to an appeal to and the "final decision" of the Commander, MSTS, or his duly

authorized representative (*infra,* pp. 34-35). Moreover, in line with the Supreme Court's observation in *Moorman* as to the intent of the parties controlling, it should be pointed out that Triple "A" apparently intended that this type of dispute be governed by a "finality" clause, since it originally submitted its dispute under Article 14, and persisted in contending that the dispute was covered by that article, which even it concedes provides for administrative finality. Therefore, it can hardly be claimed that there was no meeting of minds, or that an estoppel existed with regard to finality, at least respecting the type of dispute involved herein.[17]

B. *The Act of May 11, 1954, 68 Stat. 81, Limiting the Effect of Finality Clauses in Government Contracts, Does Not Impair the Decision Below.*

On May 11, 1954, subsequent to the date of entry of the final decree in this action,[18] legislation was enacted by Congress affecting finality clauses in Government contracts. Public Law 356, 83d Cong., 2d Sess., 68 Stat. 81 (*infra,* p. 32). Prior to the passage of the above law, if a Government contract provided for administrative determination of disputes over questions of law or fact arising under the contract, judicial review of such decisions was limited to cases where fraud by the determining official or board was alleged

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[17] This also undermines contentions that the contract should be construed against the drawing party, since libelant itself believed that this type of dispute was subject to finality by administrative decision, even though under a different article of the master contract.

[18] The Modified Final Decree was entered on April 16, 1954 (R. 109).

and shown. The term "fraud" was defined by the Supreme Court as "conscious wrongdoing, an intention to cheat or to be dishonest." *United States* v. *Wunderlich,* 342 U. S. 98, 100. Although the recent legislation wrought certain changes in the scope of judicial review of such disputes, these alterations, under the facts of the instant case, do not detract from the finality of the administrative determination here in controversy.

Specifically, Section 1 of the Act provides that no provision of any Government contract relating to the finality of decisions of disputes by Government officers or boards shall be pleaded in any suit now filed or to be filed as limiting judicial review of such decisions to cases where fraud on the part of the determining governmental representative is alleged (*infra,* p. 32). However, this section goes on to further provide (*infra,* p. 32):

> That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 2 of the Act provides that no Government contract "shall contain" a provision making the decision of any administrative official, representative, or board final on a question of law (*infra,* p. 32).

Initially it is clear that the Act does not prohibit the courts from according a large degree of finality to an administrative determination of a dispute over a question of interpretation where the contract which contains a law disputes clause was entered into prior to

the passage of the Act. Section 2 of the Act is prospective in operation in this regard. It specifies that "no Government contract shall contain" such a provision but it does not invalidate these provisions in existing contracts (*infra,* p. 32). This point is expressly made by the report of the House Committee accompanying the bill which subsequently was enacted into law, when it said:

> Section 2 of the proposed legislation will prohibit the inclusion of such reservation [finality as to law disputes] in future contracts and the first section of the proposed legislation will render decisions made under such reservation in present contracts subject to judicial review under the standards therein prescribed. (Report No. 1380 of the Committee on the Judiciary of the House of Representatives, 83d Cong., 2d Sess., p. 5).

In line with the above, Section 1 of the Act refers to "any decision" by a Government representative under a finality clause and states that "such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence" (*infra,* p. 32). Thus the criteria for sustaining administrative finality by the courts are not limited to factual disputes under a finality clause but also embrace law disputes under such a clause, which, consonant with Section 2 of the Act, was part of a Government contract entered into prior to the legislation's enactment.

Under the standards for upholding administrative finality of these disputes, as set forth in Section 1 of the Act, the decision of the court below, recognizing final-

ity, must stand. In the light of the detailed analysis of the controlling contractual documents that has previously been made (*supra,* pp. 11-21), there can be no serious allegation by libelant that the administrative determination of this dispute was "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence" (*infra,* p. 32). Moreover, the District Court, on the basis of its own examination of the relevant documents and after considering all of the evidence presented by both parties in a trial on the merits, reached the same conclusion as to libelant's contractual obligations under its bid price as had the Contracting Officer and the Contract Advisory Board. With this in mind it can hardly be claimed that the administrative resolution of this dispute transgressed the standards for upholding finality established by the Act. The District Court's ruling on administrative finality must therefore stand.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the District Court should be affirmed.

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APPENDIX

1. Public Law 356, 83d Congress, Second Session, 68 Stat. 81, provides as follows:

> To permit review of decisions of the heads of departments or their representatives or boards, involving questions arising under Government contracts:
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> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent, or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.
>
> Approved May 11, 1954.

2. The relevant provisions of Master Contract No. MST 235 between the United States and Triple "A" Machine Shop, Inc., are as follows in pertinent part:

Article 1. Performance

The purpose of this contract is to establish the terms upon which the Contractor will effect repairs, completions, alterations of and additions to vessels of the Government under job orders issued by the Contracting Officer from time to time under this contract.

Article 2. Preliminary Arrangements

* * * * *

(b) In the event the Contractor is willing and able to perform the work, the Contractor and the Contracting Officer, either before or after the arrival of the vessel at the location where the work is to be performed, shall inspect the items of work to be accomplished on such vessel and the Contractor shall as soon as practicable thereafter, as requested by the Contracting Officer, submit a bid or negotiate for the performance of the work. * * * If the Contracting Officer requests the Contractor to submit a bid, it shall as promptly as possible after inspection of the work submit a bid for the performance of the work in accordance with plans and specifications furnished or to be furnished by the Government.

* * * * *

Article 4. Performance

(a) Upon the issuance of a Job Order, the Contractor shall promptly commence the work specified therein and in any plans and specifications made a part thereof, and shall diligently prosecute

the work to completion to the satisfaction of the Contracting Officer. * * *

Article 5. Inspection and Manner of Doing Work

(a) Work shall be performed hereunder in accordance with the job order, and any plans and specifications made a part thereof, as modified by any change order, issued under Article 6.

* * * * *

(j) the Government does not guarantee the correctness of the dimensions, sizes and shapes set forth in any job order, sketches, drawings, plans or specifications prepared or furnished by the Government, except when a job order requires that the work be commenced by the Contractor prior to any opportunity to inspect the vessel. The Contractor shall be responsible for the correctness of the shape, sizes and dimensions of parts to be furnished hereunder except as above set forth and other than those furnished by the Government. Any questions regarding or arising out of the interpretation of plans or specifications hereunder or any inconsistency between plans and specifications shall be determined by the Contracting Officer subject to appeal by the Contractor to Commander, Military Sea Transportation Service, or his duly authorized representative who shall not be the Contracting Officer. Pending final decision with respect to any such appeal, the Contractor shall proceed diligently with the performance of the work, as determined by the Contracting Officer. If it is determined that the interpretation of the Contracting Officer is not

correct, an equitable adjustment in the job order price shall be made. Any conflict between this contract and any job order, including any plans and specifications shall be governed by the provisions of this contract.

* * * * *

Article 14. Disputes

Any disputes concerning a question of fact or price arising under this contract or under any job order or plans or specifications (other than matters to be determined by the Contracting Officer under Article 5(j) hereof) which is not disposed of by agreement between the Contractor and the Contracting Officer shall be referred to and decided by Commander, Military Sea Transportation Service, who shall furnish by mail or otherwise to the Contractor a copy of his decision. Within 30 days from the date of receipt of such copy, the Contractor may appeal such decision by mailing or otherwise furnishing to Commander, Military Sea Transportation Service, a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for hearing of such appeal shall be final and conclusive; provided that, if no such appeal is taken, the decision of Commander, Military Sea Transportation Service, shall be final and conclusive. In connection with any appeal from a decision by Commander, Military Sea Transportation Service, under this Article within the time limit herein specified, the Contractor shall be afforded an opportunity to be

heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract.

3. Specification No. MSTSP 51-64 provides as follows in pertinent part:

> * * * It is the intent of these specifications to provide for the complete repair and reconditioning, both mechanically and structurally, of five (5) lifeboats, all as necessary to place the boats in first class operating condition and ready for use.
>
> The work shall include, but shall not be limited to, any detailed specifications which follow:
>
> The contractor shall furnish all labor, materials, transportation and all other equipment necessary to completely repair four (4) #13 and #14 gauge galvanized steel hulls and one (1) aluminum hull lifeboats now located in Rows Numbers 1 and 4 open storage space adjacent to Warehouse 3, Oakland Army Base. * * *
>
> All work shall be subject to inspection and approval by the U. S. Coast Guard and the U. S. Navy Inspector assigned.* * *

4. Job Order No: 10, issued pursuant to Contract No: MST 235 provides as follows in pertinent part:

> This Job Order issued pursuant to the provisions of the above-numbered contract, the terms of which by this reference are made a part hereof, Witnesseth That:
>
> 1. Work: The Contractor shall furnish the supplies and services, required to perform the work

described in the attached plans and specifications made a part hereof and designated as follows: Repair to Five (5) Lifeboats, Specification No. MSTSP 51-64.

2. Price: The Government will pay the Contractor for the performance of this Job Order the following listed sum plus an amount at the unit prices on the reverse side hereof for the units specified and furnished under Article 3(c) of the above-numbered contract: $3,775.00.

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